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# In the Supreme Court of the United States

OCTOBER TERM, 1968

MARGARET THOMAS POWE AND WILLIAM A. POWE,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 1433

MARGARET THOMAS POWE AND WILLIAM A. POWE,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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The sole question before this Court is one of fact—whether the court below correctly affirmed the Tax Court's valuation, for federal gift tax purposes, of nine parcels of real estate and appurtenant mineral interests that petitioner conveyed on April 22, 1958, to an irrevocable trust (R. 21–22). On his gift tax return filed for 1958, petitioner [1] reported the fair market value of the land as $326,630 (R. 32–33). The Commissioner in his notice of deficiency increased this valuation to $664,179 (R. 52). The Tax Court determined a valuation of $531,970, *Powe* v. *Commissioner,*

[1] William A. Powe is referred to herein as petitioner. His wife, Margaret Thomas Powe, also signed a gift tax return



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decided February 24, 1966 (P-H Memo T.C., par. 66,040) (R. 53),[2] and the Court of Appeals for the Fifth Circuit affirmed (Pet. 16–18).[3]

The decision is correct, and involves neither a conflict of decisions nor any other matter warranting further review.

1. The Tax Court did not err when it considered, in finding the proper value, sub-surface mineral rights that the Commissioner's notice of deficiency had not taken into account in determining the value of the tracts. A taxpayer must show that a deficiency is wrong on any proper theory. *E.g., Reinecke* v. *Spalding,* 280 U.S. 227; *Bernstein* v. *Commissioner,* 267 F. 2d 879 (C.A. 5). Thus in making its redetermination of tax liability, the Tax Court may consider any and all relevant evidence and revise the Commissioner's determination up or down as the record warrants. Cf. Section 6214(a) of the Internal Revenue Code of 1954.

2. Petitioner was not, as he contends (Pet. 6), faced with the issue of inclusion of the mineral rights for the first time in the Tax Court's opinion. It was clear at trial that the issue was in the case (R. 299–300). The Commissioner's brief in the Tax Court argued the point (pp. 8, 10, 12, 14–16, 17–18, 27, 32–53 of

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in 1958, and each consented to be considered as donor of one-half of the gift. (R. 21.) ("R" refers to the printed record in the court of appeals.)

[2] The appendix to the petition contains a small excerpt from the Tax Court's opinion. The full opinion is at R. 20–71.

[3] The opinion of the court of appeals is now reported at 389 F. 2d 46.

that brief), and petitioner argued it in his reply brief, filed prior to issuance of the Tax Court's opinion. At no time did petitioner request a continuance, or, after the opinion was handed down, a rehearing.[4]

3. Contrary to petitioner's contention (Pet. 5), there was ample evidence to support the Tax Court's findings, including specific testimony that the lands had mineral value and what those values were.[5] Petitioner does not deny that the underlying mineral rights had value at the time of the 1958 transfer. Therefore, it was proper for the Tax Court to make the best approximation it could of the value, including the appurtenant mineral rights, from the available evidence. See *Helvering* v. *Safe Deposit Co.*, 316 U.S. 56, *Helvering* v. *Taylor*, 293 U.S. 507; *Guggenheim* v. *Helvering*, 117 F. 2d 469 (C.A. 2).

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[4] Petitioner errs in stating (Pet. 5) that the Commissioner conceded that the mineral values of the tracts were not to be included in the valuation of the properties; the supporting citation is to testimony related to mineral rights under different land parcels (R. 32, Item I–(c)).

[5] Mr. Bryant, who bought these parcels for the taxpayer (R. 22, 136, 239–241), testified that he tried to buy tracts for the value of the minerals and standing timber alone so that he would get the surface rights for nothing (R. 136). In fact, he bought the Fornea and Williams tracts primarily for mineral interests obtained. (R. 525.) Of the $35 per acre paid for the Sartin tract, $12.50 was for the 40 percent mineral interest purchased with the land. (R. 138, 219.) The $20 paid for the Barron tract included all mineral leases on most of the land. (R. 138.) He considered the mineral interest alone worth more than $16 per acre paid for the Clayton and Walter Mitchell tracts.

In the court below petitioner accepted the Tax Court's findings (R. 53) with respect to three of the nine tracts (Pet. Br. in Fifth Circuit, p. 11). With respect to all tracts, including the other six, the Tax Court's opinion shows that it gave full consideration to and carefully balanced conflicting evidence as to land costs, timber growth, and mineral rights.[6] There is no occasion for future review of these factual findings. *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U.S. 147, 153–154.

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[6] Portions of the record that the Tax Court considered in support of its valuation include the following:

*Tract*

Clayton & Walter Mitchell: R.137, 140–143, 172–173, 220–222, 240–241, 246–255, 272, 336–337, 344–345, 349–357, 361–362, 367, 379–383, 396–397, 405–412, 435–436, 466–474, 476–482, 536–545; Exs. B pp. 7–8, FF through WW.

Barron: R.138, 139, 143, 145, 149, 173, 222–223, 240–241, 252, 255, 272, 545–548; Exs. B p. 7, E through H.

Stevens: R.148, 173–174, 222, 240, 252, 255, 269–270, 397, 412–420, 461–464, 505–507, 550–553; Exs. B p. 8, W, X, Y, 3, 21, 22, 29.

Sartin: R.138, 143, 149, 173, 219–220, 223–226, 240, 255–268, 557–559; Exs. B p. 7, I, J, K, BBB.

Black & Hathorne: R. 138, 139, 148, 149, 150–152, 175, 179, 191–196, 200–202, 207–208, 239–240, 383–384, 423–431, 511–513, 559–565; Exs. AA, 6, 27.

Fornea: R.137, 274–276, 524–525, 568–575; Exs. D, BB, CC, BBB, 1-ZZ.

Lee Estate: R 131–137, 143, 548–549, 603, Ex. Z.

Gavin: R.94, 98, 109–115, 137, 139–140, 150, 152–168, 178–180, 204–206, 240, 269, 367–368, 398–405, 554–557; Exs. L through V, Z.

Williams: R. 134–137, 274–277, 525, 565–569; Exs. D, L, M, P, Q through V, DD, EE, BBB, 4, 5, 1-ZZ.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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